LEGISLATIVE UPDATE

COVERING CRIMINAL JUSTICE LEGISLATIVE ISSUES

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CRIMINAL JUSTICE LEGISLATION 2005 GENERAL ASSEMBLY

by Ernie Lewis

Ernie Lewis, Public Advocate

The 2005 General Assembly met for only 29 days. However, as has been stated numerous times, it was a historic and fruitful 29 days. Included in the accomplishments in this session, in addition to tax reform, were the following pieces of criminal justice legislation. These bills all take effect on June 20, 2005, unless an emergency clause was connected to the bill.

Methamphetamine Bill Senate Bill 63

The most significant criminal law passed by the General Assembly was Senate Bill 63. In the 2004 General Assembly, numerous proposals were made in response to *Kotilla v. Commonwealth*, 114 S.W. 3d 226 (Ky. 2003), which had arguably raised the requirements for a successful prosecution of manufacturing methamphetamine. At the 2005 General Assembly, the Governor and Lieutenant Governor made the passing of a methamphetamine bill a high priority. Numerous proposals were considered from previous sessions, resulting in Senate Bill 63. It includes the following provisions:

- A new crime of "trafficking in or transferring a dietary supplement" is created. Trafficking in a dietary supplement is a Class A misdemeanor for a first offense, and a Class D felony for a second offense. Excluded from the application of the statute are "practitioners" and pharmacists, although they are prohibited from prescribing dietary supplements containing ephedrine alkaloids "for purposes of weight loss, body building, or athletic performance enhancement."
- A new crime of "controlled substance endangerment to a child" in the first, second, third, and fourth degree is created as part of KRS 218A. The essence of this crime is that a person "knowingly causes or permits a child to be present when any person is illegally manufacturing a controlled substance or methamphetamine or possesses a hazardous chemical substance with intent to illegally manufacture a controlled substance or methamphetamine under circumstances that place a child in danger of serious physical injury or death…" The four degrees carry different injury levels. Controlled substance endangerment in the first degree is a Class A felony and requires a finding that the child dies "as a result of the commission of the offense." Second degree controlled substance endangerment requires a finding that the child "receives serious physical injury as a result of the commission of the offense." It is a Class B felony. Third degree controlled substance endangerment requires a finding of a physical injury to the child, and is a Class C felony. Fourth degree controlled substance endangerment is a Class D felony, and carries with it no injury requirement.
- The part of the bill that is new from past proposals consists of significant restrictions on the sale of ephedrine, pseudoephedrine, or phenylpropanolamine. An exception to these restrictions occurs when the product is in liquid or gel capsule form. The restricted products may be sold only by registered pharmacists, pharmacy interns, or pharmacy technicians. When the products are purchased, the buyer must show an ID with the date of birth, and sign a log with the date of the sale, the name, date of birth, and address of the buyer, and the amount of the purchased item. The log is maintained by the business, and must be kept for two years. The log is "subject to random and warrantless inspection by city, county, or state law enforcement officers." If the pharmacist intentionally

Continued on page 2

INSIDE

Continued from page 1

fails to keep the log she is subject to a $1000 fine. A person may buy only 9 grams of the product every 30 days, unless the person has a prescription. A person may buy only 3 packages of the product at any one time. A person must be 18 years of age to buy the product.

- The definition section to KRS 218A.010 is amended in several ways. The "intent to manufacture" is defined as "evidence which demonstrates a person's conscious objective to manufacture a controlled substance or methamphetamine," "Evidence can include "statements, a chemical substance's usage, quantity, manner of storage, or proximity to other chemical substances or equipment used to manufacture a controlled substance or methamphetamine."
- The statute addresses the *Kotila* issue directly by redefining manufacturing methamphetamine. This is a major change. Under the bill, one can be guilty of manufacturing methamphetamine by either manufacturing methamphetamine or by possessing two or more chemicals or two or more items of equipment for the manufacturing of methamphetamine.
- The crime of unlawful possession of a methamphetamine precursor under KRS 218A.1437 is amended to treat the possession of more than 9 grams of ephedrine, pseudoephedrine, or phenylpropanolamine within a 30 day period as prima facie evidence of intent.
- A person who either intentionally or recklessly transfers a methamphetamine precursor is also "liable for damages in a civil action for all damages, whether directly or indirectly caused by the sale or trafficking or transfer of the drug product or drug products." A lawsuit for damages may be brought by the Attorney General, a Justice and Public Safety Cabinet attorney, or by the Commonwealth's Attorney where the damages occurred.
- A new series of crimes are established in the bill related to the sale of drugs over the internet. If a person or pharmacy not licensed in the practice of pharmacy uses the internet to either fill a prescription for another person or to deliver a controlled substance or counterfeit controlled substance or prescription drug to another person, he is guilty of a Class C felony. If the substance is a Schedule I controlled substance, or if the substance is the proximate cause of a serious physical injury or death to the other person, the crime becomes a Class B felony. If convicted of the Class B felony, the convicted person may not be granted probation or shock probation. The Attorney General has authority prosecute these crimes in addition to the Commonwealth's Attorneys.

Assault in the Third Degree
Senate Bill 91

This bill arose as a direct result of the killing of Brenda Cowan, a Fayette Urban County firefighter, during an emergency run. The bill is the "Brenda D. Cowan Act." It extends the provisions of KRS 508.025, assault in the third degree, to "paid or volunteer emergency medical services personnel certified or licensed pursuant to KRS Chapter 311A…a paid or volunteer member of an organized fire department," and "paid or volunteer rescue squad personnel affiliated with the Division of Emergency Management of the Department of Military Affairs or a local disaster and emergency services organization pursuant to KRS Chapter 39F." It requires the event to occur "while personnel are performing job-related duties."

Theft by Deception
Senate Bill 96

This bill specifies the kind of notice required under KRS 514.040 to trigger the 30 days in which the maker of the check may "make good" the check. It allows the notice to be "mailed to the address printed or written on the check…" The mailed notice is deemed to have been received 7 days after mailing. "The notice may be sent by first-class mail if supported by an affidavit of service setting out the contents of the notice, the address to which the notice was mailed, that correct postage was applied, and the date the notice was placed in the United States mail."

Habitual Truancy
House Bill 72

This is a bill that primarily allows for someone to be found to be truant between the ages of 18-21, thereby extending jurisdiction over habitual truants to those 18 years of age and over. Further, the bill allows one to be found to be a habitual truant by being found to be truant twice rather than three times. Students over the age of 18, parents, guardians, custodians, and guardians of exceptional children 18-21 years of age, who violate the truancy laws may be fined from $100 for the first truancy and $250 for each subsequent truancy.

Procuring or Promoting the Use of a Minor
Senate Bill 106

This bill creates a new section of KRS 510. It makes it unlawful "for any person to knowingly use a communications system, including computers, computer networks, or computer bulletin boards, or any other electronic means for the purpose of procuring or promoting the use of a minor, or a peace officer posing as a minor if the person believes that the peace officer is a minor or is wanton or reckless in that belief…" for the crimes of rape or sodomy in the first or second degrees or unlawful transaction with a minor in the first degree.

Interstate Compact for Juveniles
House Bill 46

This bill makes Kentucky a part of the interstate compact for juveniles. Its purpose is to set out how juveniles who have left their state will be treated in a variety of situations. The Compact recognizes that "each state is responsible for the proper supervision or return of juveniles, delinquents and status offenders who are on probation or parole and who have absconded, escaped or run away from supervision and control and in so doing have endangered their own safety

and the safety of others." The Compact also recognizes that "each state is responsible for the safe return of juveniles who have run away from home and in doing so have left their state of residence." The Compact creates an Interstate Commission for Juveniles which oversees the implementation of the Compact. Each state in the Compact must create a State Council for Interstate Juvenile Supervision, the membership of which includes someone from both the Department of Public Advocacy and the Kentucky Association of Criminal Defense Lawyers as well as prosecutors and victims groups. There are thirteen purpose areas, including among the some of the following:

- Ensuring that adjudicated juveniles and status offenders "are provided adequate supervision and services in the receiving state as ordered by the adjudicating judge…"
- Ensuring public safety.
- Returning juveniles who have run away.
- Overseeing institutionalization of juveniles in need of special services.
- Providing for the supervision of juveniles.
- Establishing procedures for moving juveniles from one jurisdiction to another.
- Establishing procedures to resolve detainers.
- Collecting data.

Elder Abuse
House Bill 298

This bill has also been working its way through various previous sessions of the General Assembly with a variety of permutations. The bill makes a variety of amendments to KRS 209, the protection of adults' chapter, including the following:

- The purpose section, KRS 209.010, is expanded to including promoting "coordination and efficiency among agencies and entities that have a responsibility to respond to the abuse, neglect, or exploitation of adults."
- A caretaker who "wantonly or recklessly exploits an adult, resulting in a total loss to the adult of more than $300 in financial or other resources, or both, is guilty of a Class D felony" at present. KRS 209.990(5). "Exploitation" has been defined in the new bill as "obtaining or using another person's resources, including but not limited to funds, assets, or property, by deception, intimidation, or similar means, with the intent to deprive the person of those resources." "Deception" is defined as "creating or reinforcing a false impression, including a false impression as to law, value, intention, or other state of mind; Preventing another from acquiring information that would affect his or her judgment of a transaction; or Failing to correct a false impression that the deceiver previously created or reinforced, or that the deceiver knows to be influencing another to whom the person stands in a fiduciary or confidential relationship."
- Amendments are made to the investigations that must be done by the Cabinet for Families and Children when they receive information of exploitation, neglect, or abuse of an adult by their caretaker. The investigation is to include an "assessment of individual and environmental risk and safety factors," "identification of the perpetrator, if possible," and identification by the Office of Inspector General of failures by the institution that contributed to the abuse, neglect, or exploitation. If the investigation reveals that a crime has occurred, the Cabinet "shall immediately notify and document notification to the appropriate law enforcement agency." The Cabinet is charged with coordinating their investigation with that conducted by law enforcement.
- Each Commonwealth's Attorney and County Attorney's Office "shall have an attorney trained in adult abuse, neglect, and exploitation…if adequate personnel are available." Prosecutors are charged with taking "an active part in interviewing the adult" victim. One prosecutor is charged with handling the case "from inception to completion" if "adequate personnel are available." Prosecutors are charged with "minimi[zing] the involvement of the adult in legal proceedings, avoiding appearances at preliminary hearings, grand jury hearings, and other proceedings…"
- The Attorney General's Office is required to create a "prosecutor's manual" on prosecuting elder abuse.
- The bill establishes a variety of education requirements. The Prosecutors Advisory Council is required to develop the program for prosecutors. Each prosecutor and Commonwealth's and County Detective is required to attend a 4-hour program within 6 months of taking office, and a 2-hour update every 5 years. The Kentucky Law Enforcement Council likewise is required to develop a training component for law enforcement basic training. Training for law enforcement must include training on abuse, neglect, exploitation, the dynamics of domestic violence, child physical and sexual abuse, rape, child development, the "effects of abuse and crime on adult and child victims," lethality, profiles of offenders and offender treatment, community resources and reporting requirements, HIV, and the investigation of bias-related crime that is related to "race, color, religion, sex, or national origin." AOC is required to develop education for judges and domestic relations and trial commissioners. Judges are required to be trained every two years in the dynamics of "crimes against the elderly, including but not limited to elder abuse, neglect, and exploitation; the effects of these crimes on the elderly, institutions in which they may reside, and their families," remedies, lethality, financial issues, model protocols, community resources, and reporting requirements.
- KRS 209A is created "to identify victims of domestic violence, abuse, or neglect inflicted by a spouse, and to provide for the protection of adults who choose to access those services." Victims of domestic violence who have mental or physical disabilities are to be served un-

Continued on page 4

Continued from page 3

der KRS Chapter 209. A statutory scheme is created under KRS 209A similar to that of KRS 209 for the investigation and protection of these adults who have been abused or neglected by their spouse.

Parole Board
Senate Bill 102

This bill responds to the growth of the inmate population by making changes in how the Parole Board does its business, including the following:

- A quorum of 4 Parole Board members is created for policy and procedural matters.
- The bill allows for panels of 2-4 members. 2 members of the Parole Board may make a decision on parole as long as they both agree. If they do not agree, the matter is referred to the full board. If a panel consists of 3 members of the Board, 2 of the panel may make a decision. If a panel consists of 4 members, a majority of the panel must agree on the parole decision.

Failing to Maintain Insurance
House Bill 63

This bill separates out the penalty provisions for the operator and the owner of a vehicle being driven without insurance. The owner is subject both to having his motor vehicle registration revoked for 1 year as well as being fined $500-1000 and/or receiving 90 days in jail. It is frankly unclear to me whether this is a change in the law, or just a clarification. The bill maintains the same penalties for the operator of the motor vehicle, although there is created a special penalty provision for the operator. Where the owner is also the operator, "the person shall be subject to penalties under both" subsections of the bill. The bill also states that a person who has operated a motor vehicle without insurance three or more times within a 5 year period is a "habitual violator."

Mobile Infrared Electronic Transmitter
House Bill 17

This bill makes it unlawful to use a "MIRET", or a mobile infrared electronic transmitter. This is a device that "emits an infrared beam or electronic signal" which "may be used to change the lighting cycle of a traffic control signal." Using a MIRET to change the lighting cycle of a traffic light is a violation with a maximum fine of $500. If a person is involved in a "motor vehicle collision which involves physical injury" while the defendant is using a MIRET, the person may be found guilty of a Class B misdemeanor. If the person suffers a serious physical injury, the defendant may be found guilty of a Class A misdemeanor. There are some persons who may use legally a MIRET, including the occupant of an emergency vehicle that is responding to an emergency situation, and government workers who are working on traffic control signals.

Transportation Bill
House Bill 133

This bill makes extensive changes to the statutes governing commercial driver's licenses. It makes unlawful a number of acts relating to trains, including the following:

- Knowingly dropping any object in the path of a railroad rail or track, locomotive, engine, railroad car, or other railroad vehicle.
- Climbing onto a locomotive, railroad car, or other railroad vehicle while on the track.
- Disrupting, delaying, or preventing the operation of a train or other railroad vehicle.
- Knowingly defacing, damaging, obstructing, removing, or impairing the operation of a railroad grade crossing warning signal or other protective device.
- All of the above are Class A misdemeanors.
- Where the violation of these laws results in damage to property worth more than $1000 or creates a "substantial risk of serious physical injury," the violation becomes a Class D felony. If the violation causes physical injury, it becomes a Class C felony. If it causes serious physical injury, the violation becomes a Class B felony.
- Finally, the acts prohibited in KRS 277.350 relating to going onto railroad property, have been changed from a criminal trespass in the third degree to a criminal trespass in the second degree.

Serving Process
Senate Bill 105

This bill raises from $10.00 to $30.00 the cost of serving process or arresting the party in misdemeanor cases.

Budget Bill
House Bill 267

House Bill 267 is the budget bill. Budget bills are an expression of the policy choices made by the Executive and Legislative Branch. In that sense, it is also a bill that expresses criminal justice policies. Here are some of the details of the budget bill that effect criminal justice.

- The total budget for the Justice and Public Safety Cabinet is $709,861,000 for FY05 and $733,018,700 for FY06.
- Justice Cabinet Administration is funded at $26,947,200 for FY05 and $27,836,300 for FY06.
- $1.5 million of the Justice Cabinet Administration appropriation goes to the Office of Drug Control Policy for FY05.
- $1 million is appropriated from the Justice Cabinet budget for both years for "regional Drug Courts to be established in Kentucky's coal-producing counties."
- $500,000 is allocated from the Justice Cabinet budget for "drug and substance abuse education programs."

- The Justice Cabinet Administration budget also includes $1 million in FY06 for "drug and substance abuse treatment for nonviolent offenders in local jails."
- The Office of Drug Control Policy was given $1.5 million for Operation Unite.
- Civil legal services is receiving $1.5 million in each year of the biennium.
- The Justice Cabinet Office of Investigations is limited to Executive Branch investigations.
- The Department of Criminal Justice Training is funded at $41,250,100 for FY05 and $44,293,800 for FY06. Included in this is $36.2 million in FY05 and $39.3 million in FY06 for the Kentucky Law Enforcement Foundation Program Fund.
- The Department of Juvenile Justice is receiving $111,619,300 for FY05 and $110,208,600 for FY06.
- The Kentucky State Police is receiving $132,990,200 for FY05 and $134,848,200 for FY06.
- Adult Corrections is funded at $200,130,100 for FY05 and $207,236,900 for FY06.
- A new home incarceration statute was made part of budget language, and "shall have permanent effect." This language states that all Class C and D felons who are serving a sentence at a state-operated prison are eligible "to serve the remainder of his or her sentence outside the walls of the detention facility under terms of home incarceration using an approved monitoring device…" This does not apply to those who have been found guilty of a violent felony, nor to one who has been convicted of a sex crime. This applies only when the inmate has sixty days or less to serve, has participated in a "discharge planning process," and "has needs that may be adequately met in the community…" A person on home incarceration is viewed as remaining in DOC's custody, and an "unauthorized departure from the terms of home incarceration may be prosecuted as an escape…"
- Community Services and Local Facilities for the Department of Corrections is funded at $89,351,400 for FY05 and $99,633,100 for FY06.
- Local jail per diem is increased to $30.51 per prisoner per day to counties for housing state inmates.
- Local Jail Support is funded at $15,276,100 for FY05 and $16,236,100 for FY06.
- The Department of Corrections Management is funded at $41,312,000 for FY05 and $41,598,900 for FY06.
- The total budget for the Department of Corrections is $346,069,600 for FY05 and $364,705,000 for FY06.
- The budget for the Department of Vehicle Enforcement is $17,452,800 for FY05 and $17,509,600 for FY06.
- The Department of Public Advocacy budget is $33,531,800 for FY05 and $33,617,200 for FY06. This includes the following language: "Included in the above Restricted Funds appropriation is $830,400 in fiscal year 2004-2005 and $990,200 in fiscal year 2005-2006 to provide assistance in handling increasing caseloads in public advocacy offices statewide. Any balance remaining at the end of fiscal year 2004-2005 shall not be transferred to the credit of the General Fund, but shall be carried forward into fiscal year 2005-2006 to be utilized for caseload assistance." This language will allow all $1.8 million that was added for the biennium to be spent in FY06 and added to DPA's base budget.
- There is budget language requiring regional mental health/mental retardation board staff to provide training to new jailers and jail staff on "screening and responding to the needs of inmates with mental illness within six months of employment. Treatment services may also be provided for within this funding allocation."
- The Office of the Attorney General is funded at $25,319,300 for FY05 and $25,099,800 for FY06.
- Commonwealth's Attorneys are receiving $28,797,300 for FY05 and $29,795,600 for FY06. This includes $450,000 in FY06 "to provide assistance in handling increasing caseloads in Commonwealth's Attorneys' offices statewide." There is also $262,600 in FY06 "for additional staffing resources."
- County Attorneys are receiving $23,409,800 for FY05 and $24,920,200 for FY06. Included in that is $450,000 in FY06 "to provide assistance in handling increasing caseloads in County Attorneys' offices statewide" as well as $540,000 in FY06 "for additional staffing resources."
- The Unified Prosecutorial system is funded at $52,207,100 in FY05 and $54,715,800 for FY06.
- New circuit judges were added to the Tenth, Thirteenth, Twentieth, Twenty-seventh, Eighth, Thirty-eighth, Forty-second, Fifty-third, and Fifty-fifth circuits.
- New district judges were added to the Eighth, and Sixtieth districts.
- For FY 05, $3,900,00 is provided for guardian ad litems; this is increased to $5,900,000 in FY06.
- The Board of Claims/Crime Victims' Compensation Board is receiving $4,187,400 for FY05 and $4,209,500 for FY06. Examinations for reported victims of sexual assaults are paid from the Crime Victims' Compensation Board funds.■

Each time a man stands up for an ideal or acts to improve the lot of others or strikes out against injustice, he sends forth a tiny ripple of hope.

— Robert Kennedy

General Assembly Gives Some Relief to Overworked Public Defenders

By Ernie Lewis

Introduction

Public defenders received good news from the 2005 General Assembly. In the middle of the "Justice Jeopardized" campaign, the 2005 General Assembly made available $1.8 million for FY06 to the Department of Public Advocacy. This will enable DPA to achieve a long-term and a short-term goal. First, DPA will be able to complete the full-time system at the trial level during FY06. Second, DPA will be able to reduce excessive caseloads pending the request for a fully funded public defender system before the 2006 General Assembly.

Excessive Caseloads Have Been a Chronic Problem

Public defenders in Kentucky have been experiencing a caseload crisis for the past decade. In 1997, Bob Spangenberg on behalf of the American Bar Association Bar Information Program, examined the Kentucky public defender system. Part of his report stated that "[o]vershadowing all of the problems facing and the solutions proposed by DPA is that of burgeoning caseloads. Over the past decade DPA's caseloads have increased dramatically, while funding has failed to keep pace." The *Blue Ribbon Group on Improving Indigent Defense for the 21st Century* found that "[the Department of Public Advocacy per attorney caseload far exceeds national caseload standards." In that same report, in Recommendation #6, the *Blue Ribbon Group* recommended that "[f]ull-time staff should be increased to bring caseloads per attorney closer to the national standards. The figure should be no more than 350 in rural areas and 450 in urban areas."

Since the *Blue Ribbon Group* met and called upon policy makers to lower caseloads, Kentucky public defender caseloads continued to increase. In FY00, DPA handled 97,818 cases. This increased to 101,847 in FY01, 108,078 in FY02, 117,132 in FY03, and 131,094 in FY04. The increase between FY03 and FY04 was a 12% increase. Cases per attorney have also increased, from a low of 420 new cases per lawyer in FY01 to 489 per lawyer in FY04. As a result, DPA trial attorneys are now handling 185% of nationally recognized standards. Another way of looking at this crisis is that a public defender in Kentucky has only 3.8 hours to spend on each case.

In response to this chronic and increasing problem, DPA has been engaged in a campaign called "Justice Jeopardized" since the fall of 2004. The Public Advocacy Commission has been holding several public meetings across the Commonwealth, the first being in Somerset in December of 2004, and the second in Covington in February 2005. A third meeting will have been held on May 20, 2005 in Bowling Green. Two more meetings, one in Eastern Kentucky and one in Western Kentucky, will complete these public meetings. A report by the Public Advocacy Commission will follow.

It is in the context of this chronic problem that the 2005 General Assembly considered the budget for public defenders. And the General Assembly was responsive to the needs of public defenders.

2005 General Assembly Funds Completion of the Full-time System

The Public Advocacy Commission in 1990 set as a goal the completion of a full-time system at the trial level. In 1996, when I was appointed Public Advocate, I made that my primary goal as well. At that time, public defender services were delivered by the full-time defender method in only 47 counties. In each session of the General Assembly since 1996, the legislature has allotted additional funding to DPA to open new offices and to cover more counties. By the time of the 2005 General Assembly, DPA covered 118 counties out of Kentucky's 120. Only Barren and Metcalfe Counties remained utilizing a part-time contract delivery system.

The 2005 General Assembly made the decision to go forward with the completion of the full-time system. Money has been allotted to open an office in Glasgow that will cover not only Barren and Metcalfe Counties but also Monroe County. Covering Monroe County will grant caseload relief to the Columbia Office, as well as alleviating some travel in the office.

In addition, DPA will be able to split up the Morehead Office which, like the Columbia office, is covering an area too large to be efficient. An office will be located in either Carter or Greenup County to cover those two counties as well as Lewis County. Other configurations are also possible. A decision on the location of this office is to be made prior to the end of the fiscal year.

Thus, by the end of this budget cycle, DPA will have completed its full-time system at the trial level. Every indigent person charged with a crime should be defended either by a full-time public defender, or if the case is a conflict, by a private attorney on contract with a full-time office.

I am personally convinced that with the completion of this policy goal, we have created a structurally superior public defender system of which Kentucky can be proud. Virtually all cases will be handled by a full-time criminal law expert, a lawyer who specializes in the practice of criminal law. This system is overseen by supervisors, managers, division directors, and a Public Advocate. I believe that many of the problems encountered in other states with their public defender systems have been alleviated with the creation of the full-time system.

General Assembly Funds Limited Caseload Relief

The General Assembly also was responsive to the issue of excessive public defender caseloads. The General Assembly funded 16 caseload reduction attorneys as well as 7 support staff positions. In FY04, DPA trial attorneys averaged 489 new open cases per lawyer per year. That is 185% of nationally recognized standards. With 16 additional positions, it is estimated that the caseload per attorney will be lowered to 444 new cases per lawyer. That remains significantly above nationally recognized standards. Yet, with these additional positions, DPA has the time for a more significant request for a fully funded defender system that will address the underlying chronic underfunding.

Goal for 2006 is a Fully Funded Public Defender System

DPA has now completed its full-time system. DPA is a statewide administered and controlled public defender system. Kentucky has an excellent structure, and a progressive delivery system. There remains one significant barrier and that is funding.

DPA's goal for the 2006 is nothing less than a fully funded public defender system. It is time that Kentucky funded indigent defense at a level that would bring Kentucky into the middle of the nation.

DPA's first goal is to reduce caseloads to no more than 400 cases per lawyer per year. This remains above national standards, which allow for no more than 150 felonies, 200 juvenile cases, nor 400 misdemeanors in a year. 23% of DPA's trial level caseload is located in circuit court. Yet, reducing caseloads to 400 cases per lawyer will help immensely. DPA is also going to ask to raise by 25% the money going to private lawyers where there is a conflict of interest.

Second, DPA wants to improve support that is given to those lawyers. DPA now has 1 secretary for every 3 lawyers, and 1 investigator per office (outside Louisville and Lexington). DPA wants to have 2 secretaries for every 5 lawyers, and 1 investigator for every 6 lawyers.

DPA also is going to request a social worker for every field office. Public defender offices around the country are including social workers in their delivery systems. A social worker can assess a person with a substance abuse problem early in the process and make treatment recommendations. A social worker can prepare an alternative sentencing plan, find treatment options, prepare predisposition reports in juvenile cases, and find mitigation for sentencing purposes.

These budget items are necessary for DPA to become the public defender system that Kentuckians have a right to expect. A fully funded defender system will ensure that the innocent are not wrongfully convicted and that verdicts are reliable, that the court system has a public defender to help process cases efficiently and effectively, and that indigent accused persons are treated fairly by the criminal justice system. ■

Ours is a government of laws, not men, John Adams said. American society is founded on the commitment to law, binding the rulers as it does the ruled. Our willingness to assure the least among us the guiding hand of counsel is a test of our American faith.

— Anthony Lewis, from the Foreword to *Gideon's Broken Promise* (December 2004)

COMMISSION HOLDS 2ND PUBLIC MEETING IN COVINGTON

By Shannon Means

The Public Advocacy Commission recently held a second public meeting to explore the caseload crisis in the public defender system in Kentucky. The meeting was held on February 18, 2005, at the Embassy Suites River Center in Covington, KY. More than 85 participants were on hand, representing public defenders, prosecutors, district and circuit judges, and other members of the criminal justice community. Other participants included Commission members, members of the Justice and Public Safety Cabinet, NAACP, members of the media, and members of the community. Commission Members present were Mark Stavsky, Melinda Wheeler, Ed Worland, John Rosenberg, and Jerry Cox.

Following receipt of the 2004 Caseload Report, the Public Advocacy Commission began hosting a series of public meetings to solicit input from the criminal justice community regarding continued increases in caseloads among Kentucky's public defenders. The Annual Caseload Report revealed, among other things, that caseloads had gone up by 12% in FY04, that the average trial attorney opened 489 cases in FY04 and that 489 mixed cases was 185% of national standards. Commission members decided it was necessary to visit each of the trial regions and hear from public defenders, their families, and other parts of the criminal justice system to determine how better they as a Commission could react to what is a gathering caseload crisis.

Throughout the meeting, Commission members heard testimony from public defenders, concerned members of the private bar, judges, prosecutors, and others. The consistent theme was that of an overwhelmed and jeopardized criminal justice system. A former client of the Maysville Office testified and described the representation she had received. A single mom who could not afford the $6500 cited to her as a fee by a private lawyer, she described the horror stories she had heard about public defenders. Her experience, however, included glowing descriptions of her lawyers, Tom Griffiths and LaMer Kyle-Reno, who had worked nights and weekends to defend her.

Shannon Means

Public Advocacy Commission member, and Executive Director of the Administrative Office of the Courts, Melinda Wheeler, stated that everyone in the criminal justice system is overworked. "It is time for everybody to come together to improve the system." She stated that we are pouring money into law enforcement without looking at the effect of that use of resources on the entire system.

Three additional meetings are planned during 2005. A report will then be prepared by the Commission to be presented to the Governor and the General Assembly. ■

Commission Members Ed Worland, Melinda Wheeler, and Mark Stavsky

Mary Rafizadeh, Covington Directing Attorney

Ed Worland

Judge Steve Jaeger

Judge Greg Barlett

Justice Jeopardized

THE JUVENILE DEATH PENALTY IS UNCONSTITUTIONAL

By Jeff Sherr

The United States Finds Death Penalty for 16 and 17 Year-olds Unconstitutional in *Roper v. Simmons*

In March of this year, the United States Supreme Court ruled that the death penalty "is a disproportionate punishment for juveniles." Therefore, the Court said, imposing a death sentence on a youthful murder, who committed the crime before age 18, violates the Eighth and Fourteenth Amendments to the federal constitution.

The decision overturned a1989 decision by the Court, in *Stanford v. Kentucky*, allowing the execution of murderers who committed their crimes when they were 16 or 17 years old. In the *Stanford* decision, the Court majority found, at that time, there was no national consensus against executing juveniles.

The Court found that in 2005 there now exists a national consensus against the execution of 16 and 17 year-olds, noting that 30 states now bar such sentences — 12 that have abolished the death penalty for all persons, and 18 that retain the death penalty but do not allow it for juveniles. Even in the 20 states that have not formally banned it, by legislation or court ruling, the majority said, "the practice is infrequent." In the 16 years since 1989, it noted, six states have executed juveniles for their crimes, but, in the past 10 years, only three have done so: Oklahoma, Texas and Virginia.

In Kentucky since 1976 only three juveniles had been convicted and sentenced to death. None of the three was facing execution at the time of the *Roper* decision, though. The Kentucky Supreme Court had already reversed two of these convictions. One, Todd Ice, was found guilty of manslaughter at his re-trial. The second, Larry Osborne, was acquitted. In 2003, Kevin Stanford, the defendant in the Supreme Court's *Stanford* decision, was granted a commuted sentence of Life without possibility of parole. In Roper, the Supreme Court cited this as part of the evidence of the national consensus against death penalty for juveniles:

> In December 2003 the Governor of Kentucky decided to spare the life of Kevin Stanford, and commuted his sentence to one of life imprisonment without parole … By this act the Governor ensured Kentucky would not add itself to the list of States that have executed juveniles within the last 10 years even by the execution of the very defendant whose death sentence the Court had upheld in *Stanford* v. *Kentucky*.

Legislative Efforts to Ban the Juvenile Death Penalty in Kentucky Confirmed by *Roper*

Since 1998, bills have been introduced in the General Assembly to abolish the juvenile death penalty in Kentucky. These bills were backed by a broad coalition including churches, mental health, and youth rights organizations.

Jeff Sherr

In sponsoring and supporting this legislation the following points were made:

- The reasoning of *Atkins* decision, finding the execution of mentally retarded unconstitutional, applies equally to the execution of juveniles
- Polls demonstrate Kentuckians do not support death penalty for children
- Judgment is undeveloped into late adolescence
- The death penalty is not a deterrent for children
- The death penalty is seldom used against children
- Children are denied many rights due to their inability to exercise mature and sound judgment
- Less than half of the states have death penalty for juveniles
- U. S. is isolated in the world in the killing children

In *Roper*, the United States Supreme Court applied all of the same reasoning in coming to its conclusion.

In addition to relying on the trend away from the execution of juveniles, as explained above, the *Roper* Court cited scientific and sociological studies showing significant differences between adults and juveniles under 18. "The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character … From a moral standpoint, it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."

The Court also found that the two social purposes that the death penalty serves — retribution and deterrence — have less force, or none at all, with regard to juvenile offenders. The same characteristics of youth that make then less culpable than adults also suggest they will be less susceptible to deterrence.

The Court, in finding a new consensus against executing juveniles, also relied upon what it called "the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty." While it said that worldwide developments are not

"controlling," since it is the Court's own responsibility to interpret our Eighth Amendment, it added that since 1958 the Court "has referred to the laws of other countries and to international authorities as instructive" in defining the meaning of that Amendment.

Conclusion

Kentucky legislative efforts have led this nation in the past. Our Commonwealth outlawed the execution of people with mental retardation long before the practice was abolished by the United States Supreme Court. Our Commonwealth enacted the first Racial Justice Act in the nation. Our Commonwealth instituted a public defender system before mandated by the Supreme Court in Gideon. Significant progress was made toward the elimination of the juvenile death penalty, well before the Supreme Court's recent decision. We can be proud that Kentuckians have led in the fight to make ours a kinder, gentler, and more just society. ■

Bills Introduced in the Kentucky General Assembly to Eliminate Death Penalty for 16 and 17 year-olds and the Sponsor(s)

2004
SB 166/CI (BR 1440) - G. Neal, J. Pendleton

HB 475/CI (BR 1408) - R. Webb, T. Feeley, J. Adams, P. Bather, S. Brinkman, B. Buckingham, T. Burch, J. Callahan, M. Cherry, P. Clark, R. Crimm, J. Draud, T. Edmonds, D. Graham, K. Hall, M. Harper, J. Haydon, J. Higdon, D. Horlander, M. Marzian, R. Meeks, R. Mobley, S. Nunn, R. Palumbo, T. Riner, A. Simpson, K. Stein, J. Wayne, S. Westrom, R. Wilkey, B. Yonts

2003
SB 15/CI (BR 282) - G. Neal

HB 180/CI (BR 238) - R. Webb, S. Brinkman, P. Clark, T. Feeley, D. Graham, R. Meeks, T. Riner, J. Wayne, S. Westrom

2002
SB 127/CI (BR 1468) - G. Neal, W. Blevins, D. Karem, M. Long, E. Miller, J. Pendleton, E. Scorsone, Jo. Turner

HB 447/CI (BR 1467) - R. Webb, T. Feeley, J. Adams, P. Bather, L. Belcher, S. Brinkman, T. Burch, P. Clark, R. Crimm, G. Graham, B. Heleringer, M. Marzian, R. Meeks, A. Simpson, K. Stein, J. Wayne, S. Westrom, R. Wilkey

2000
HB 311/CI (BR 1391) - E. Jordan, B. Heleringer, M. Marzian

1998
HB 691/CI (BR 2279) - E. Jordan, B. Colter, P. Hatcher Jr, B. Heleringer, J. Wayne

Organizations Which Supported the Abolition of the Death Penalty in Kentucky

American Civil Liberties Union of Kentucky
Amnesty International
Catholic Conference of Kentucky
Central Kentucky Council for Peace and Justice
Children's Alliance
Christ the Healer Church, Edmonton
Church Women United (Louisville Area)
Commonwealth of Kentucky Dept. of Juvenile Justice
Commonwealth of Kentucky Dept. of Public Advocacy
Dominican Sisters, Cong. of St. Catharine of Siena
Fairness Campaign
Fellowship of Reconciliation
Glenmary Sisters
Greater Community Council
Greater Louisville AME Ministerial Fellowship
Interdenominational Ministerial Coalition
Jefferson County Fiscal Court
Jewish Community Relations Council,
Jewish Federation of Louisville
Justice and Peace Office, Diocese of Covington
Justice Resource Center
The Juvenile Justice Advisory Committee of Kentucky
Kentucky Alliance Against Racist and Political Repression
Kentucky Academy of Child and Adolescent Psychiatry
Kentucky Association of Criminal Defense Lawyers
Kentucky Citizens United for the Rehabilitation of Errants
Kentucky Coalition to Abolish the Death Penalty
Kentucky Council of Churches
Kentucky Disciples Peace Fellowship
Kentucky Domestic Violence Association
Kentucky Fairness Alliance
Kentucky Murder Victims Families for Reconciliation
Kentucky Native American Support Group
Kentucky Psychological Association
Kentucky Psychiatric Association
Kentucky Rainbow Coalition
Kentucky Youth Advocates
Mental Health Association of Kentucky
National Association for the
Advancement of Colored People
National Mercy Justice Coalition (Sisters of Mercy)
National Organization for Women [NOW]
No More Violence Campaign
Office of Social Concerns, Diocese of Owensboro
Peace and Justice Commission, Archdiocese of Louisville
Presbyterian Child Welfare Agency
St. Luke Catholic Church, Salyersville
Quaker Committee on Kentucky Legislation
Sisters of Charity of Nazareth
Sisters of Loretto
Union of American Hebrew Congregations
Ursuline Sisters of Louisville
Ursuline Sisters of Maple Mount Kentucky
Women and Men Religious Against the Death Penalty

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